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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/634,464	08/04/2003	Daniel Rodier	13183.174US	6738
24283	7590	11/09/2005	EXAMINER	
PATTON BOGGS 1660 LINCOLN ST SUITE 2050 DENVER, CO 80264			HANLEY, JOHN C	
			ART UNIT	PAPER NUMBER
			2856	

DATE MAILED: 11/09/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/634,464

Applicant(s)

RODIER, DANIEL

Examiner

John C. Hanley

Art Unit

2856

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 28 October 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE


8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☐ Other: _____.

Continuation of 11.

Applicant correctly assumed that the rejection under 35 UCS 103(a) was to be applied to claims 1-2, 10-16, 22, 24-25 and 27. Applicant's remarks have been read and considered but do not overcome the rejections. The rejection under 35 USC 112, paragraph one has not been overcome by applicant's remarks. The critical exclusion via the negative limitation was not supported by the original specification. MPEP 2173.05(i) deals with negative limitations. It states that any negative limitation or exclusionary proviso must have basis in the original disclosure. It goes on to state the mere absence of a positive recitation is not basis for an exclusion. Therefore, there is insufficient basis in the original disclosure for the critical exclusionary proviso that the measurement element is not coated with an odorant molecule attachment material by the mere absence of one being shown in the drawings or discussed in the specification. Therefore, there is no basis for this exclusion. The Examiner made no rejection on the fact that a negative limitation, per se, is improper, as implied by applicant's remarks. Applicant's arguments with respect to the rejection under 35 USC 103(a) is similarly unpersuasive. Applicant first criticizes the Examiner's interpretation of the claims, yet points out no error in the Examiner's interpretation. The Examiner reasserts the principle that elimination of an element and its function is obvious if the function of the element is not desired. (See MPEP 2144.04 (II)). Fu, in its summary in column 3, lines 44+, states that the aerogel or other surface area increasing material is coated with a polymer or equivalent material that can be tuned for the attachment of [specific molecules, etc]. Therefore, removal of the coating is obvious if the coating's function of tuning to a specific molecule is not desired. Therefore, applicant's argument that the Fu will not work for the intended use of monitoring specific molecules is consistent with the elimination of an element and its function being obvious. Further, the removal of the coating would not destroy the function of the aerogel in providing a very high surface area for capturing molecules or particles. It is further noted that the Examiner previously cited a reference to Bein et al (US patent number 5151110) that shows a sensor where an uncoated sol-gel material is used in a sensor for sorbing chemicals to be sensed. Fu was applied instead of Bein because it taught the specifics of the aerogel material recited in applicant's claims, and clearly taught that a high surface area is desirable.



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